Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1962.

No. 465

PRISCILLA ALDEN BEACH, a/k/a PRISCILLA A. HICKEY, Widow,

Plaintiff,

vs.

ONEIDA NATIONAL BANK AND TRUST COMPANY OF CENTRAL NEW YORK (SUCCESSOR TO ROME TRUST COMPANY) and JOHNSON D. McMAHON,

Defendants.

PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

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IN THE

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No. MISCELLANEOUS.

PRISCILLA ALDEN BEACH, a/k/a PRISCILLA A. HICKEY, Widow,

Plaintiff,

vs.

ONEIDA NATIONAL BANK AND TRUST COMPANY OF CENTRAL NEW YORK (SUCCESSOR TO ROME TRUST COMPANY) and JOHNSON D. McMAHON,

Defendants.

PETITION FOR WRIT OF CERTIORARI.

Opinions delivered by the U. S. Court of Appeals for the Second Circuit and by the Trial Court for the Northern District of New York. Original opinion reported in 269 Fed. 2nd 367; Second opinion delivered June 11, 1962 and not reported as yet. Judgment entered June 29, 1962. Opinion of Judge Brennan delivered December 1961. All opinions printed in Appendix herein.

Decision Herein In Conflict With Rule In First Circuit.

Pursuant to provisions of, Rule 19(b) hearing by this Court is requested on the ground that the decision herein is in direct conflict with the holding in the case of *Standard Machinery Company* v. *Duncan Shaw Corporation*, 208 Fed. 61, 65.

The Court said:

> "It is fundamental that damages may be assessed in favor of a beneficiary against a defaulting trustee either to compensate the beneficiary for such loss as he may have sustained as a result of the breach of trust, or to prevent the faithless trustee from injustly enriching himself as a result of his breach of fiduciary duty. Am. Law. Inst. Restatement, Trusts #205; Scott, Trusts, #205 * * *"

Decision Conflicts With New York Law.

Second, petitioner herein contends that the United States Court of Appeals, Second Circuit has decided this case directly in conflict with the law of New York and with the majority rule. New York law is clear to the effect that constructive fraud is equivalent to actual fraud, and as such creates a factual question for the jury and that under the plaintiff's proof herein the trial court had no power to take the case away from the jury by a directed verdict because plaintiff by showing the adverse and conflicting capacities in which defendant McMahon acted proved a *prima facie* case of fraud which the defendant had a duty to rebut if possible. Under the facts herein if a verdict should have been directed under the evidence adduced that directed ver-

dict should have been for the plaintiff under *Butler* v. *Prentiss*, 158 N. Y. 49; Vol. 3, Pomeroy Equity Juris, #956; *Trice* v. *Comstock*, 121 Fed. 622, 623.

Violation of Mandate Allowed So That Due Process Lacking Under Amendment V, U. S. Constitution.

Third, the United States Court of Appeals, Second Circuit, has sanctioned a gross abuse of its own mandate and of due process of law by the trial court, Northern District of New York in this case. Plaintiff brought suit in June 1958 with a complaint containing five causes of action, which followed the case of *Payne* v. *Hook*, 7 Wall. 425 and *Blacker* v. *Thatcher*, 145 Fed. 2nd 255, Cert. Den. 324 U. S. 848.

However, the violation of trust duties here entitled the plaintiff to relief on additional grounds. Plaintiff's mother Carrie Beach died November 15, 1951. On June 12, 1958 there had been no accounting of any kind. Plaintiff's brother Samuel H. Beach, Jr. had been executor and did absolutely nothing prior to his death on June 30, 1953. Nor had the trustee Rome Trust Company been any more diligent although the trustee was named in the will which was probated February 26, 1952, no acceptance of the trust was made or filed until June 11, 1953 and the trustee did not secure possession of the trust assets from defendant McMahon until September 1953. So the trustee defaulted on its obligation, laid down by *In Re Kelloggs Est.*, 214 N. Y., for a period of about twenty months. During this period plaintiff beneficiary under the trust received no income whatsoever although she owned in trust a block of 495 shares of Beach Lumber Company common stock.

The trustee has never to date brought any action against Beach Lumber Company to compel declaration of dividends because defendant McMahon was an interlocking director of both companies and a vice-president of Rome Trust Company and as counsel for the heirs of Samuel H. Beach, Jr., represented their position as remainder men and was able to defraud plaintiff of all dividends although the Beach Lumber Company between 1951 and 1960 piled up a huge undivided surplus of over $400,000 in addition to payment of large salaries to the heirs of Samuel H. Beach, Jr.

Furthermore, no administrator of any kind was ever appointed to succeed Samuel H. Beach, Jr. as executor of the Estate of Carrie H. Beach, deceased. But Robert Beach, the son of Samuel H. Beach, Jr. sought to become administrator de son tort, and attempted to hinder the plaintiff in getting relief against the fraud of McMahon and Rome Trust Company.

The trial judges in the northern District refused to give the plaintiff injunctive relief and on the other hand erroneously and deliberately prevented plaintiff from securing a jury trial of this case on the ready calendar from March 1960 to June 1961. Plaintiff applied to the Second Circuit to enforce its mandate in June 1960 and June 1961 but both requests for relief in the United States Court of Appeals were denied.

In 1959 the Second Circuit reversed the decision of Judge Foley who had dismissed the fifth cause of action for fraud and conspiracy. The Court of Appeals said:

> "The decision below insofar as it dismissed plaintiff's claims for a declaration of her alleged legal

ownership of certain assets, and for breach of trust against the Rome Trust Company and McMahon is reversed and the cause is remanded for proceedings not inconsistent with this opinion."

In the fifth cause of action of the original complaint plaintiff did not plead fraud and deceit but not having had the benefit of discovery because blocked by the defendants alleged a general cause of action charging McMahon with fraud for his various activities with adverse and conflicting interests in seven capacities.

Plaintiff sought to stand on this complaint and Judge Foley overruled a series of subsequent motions to dismiss addressed to the complaint on grounds it did not allege the fraud with particularity.

Judge Stephen Brennan in April 1961 after drawing a jury would not allow plaintiff to try the case under the original complaint and ordered plaintiff to amend the complaint sought to omit all reference to fraud, with a charge merely of negligence by McMahon and Rome Trust Company although said judge was aware as was plaintiff that the facts indicated there had been construetive fraud practiced by McMahon and the trustee, as shown by McMahon's violation of Canon C, Opinion 10, Canons of American Bar Association and of the law of trusts by acting as counsel for the Estate of Carrie Beach and by later accepting the office in 1955-1958 of vice-president of Rome Trust Company which had been acting as trustee for the Estate of Carrie Beach and for the assets in the life estate of plaintiff. McMahon was guilty of aiding and abetting a breach of trust by Rome Trust Company in not suing to compel Beach Lumber Company to declare common stock cash dividends

instead of accumulating a huge surplus which would go to the heirs of Samuel H. Beach, Jr. as remainder-men and plaintiff as life tenant would obviously be defrauded of all income.

The Court of Appeals having held plaintiff's original fifth cause of action charging fraud and conspiracy valid certainly did not have the power to sustain Judge Stephen Brennan's decision under the amended complaint. The amended complaint alleged specific loans and lines of credit to McMahon totalling $326,000, over the period 1952-1960. Additional facts showed Rome Trust Company failed to protect plaintiff by accepting the trust promptly in November 1951 after Carrie Beach's death, receiving the assets in September 1953 sixty days after the death of the original executor, Samuel H. Beach, Jr.

The Court of Appeals had no power to reverse its original ruling that plaintiff had pled sufficient fraud in the original complaint by showing McMahon's adverse and conflicting capacities and that plaintiff on an estate of $250,000 had received $1,200 per year income. No fraud and deceit such as Judge Stephen Brennan later ruled necessary were pled there and constructive fraud was pled. This is sufficient under New York Law.

Constitutional and Statutory Provisions Involved.

U. S. Constitution.

Amendment VII.

"In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by

> a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Amendment V provides:

> "No person shall be held * * * nor be deprived of life, liberty, or property, without due process of law."

Under Rule 23(d) plaintiff claims a violation of Amendment VII, United States Constitution and Amendment V, United States Constitution.

Hearing is also requested on the ground the United States Circuit Court, Second Circuit has decided the basic question that there can be no constructive fraud as held in *Butler* v. *Prentis*, 158 N. Y. 49, 52 N. E. 652.

Jurisdiction of This Appeal.

Title 28 U. S. C. A. #1254:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following method:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Questions Presented for Review.

I. Does a Court of Appeal which has held a cause of action sufficient for fraud have the power after a trial court refuses to give the plaintiff a jury trial for over two years under its mandate to subsequently affirm a holding of a trial judge taking the case from the jury

upon the ground that plaintiff should have alleged and proved fraud and deceit although plaintiff's complaint never alleged any facts except those showing breach of trust and constructive fraud on a testamentary trust where plaintiffs quarter interest in a family lumber company returned no common stock dividends to plaintiff although the company accumulated a huge surplus of $400,000?

II. Have the requirements of due process of law been complied with by the trial court Northern District of New York and by the Court of Appeals, Second Circuit, in this case?

III. Has plaintiff been given a jury trial under the provisions of Amendment VII, United States Constitution, in this case?

Concise Statement of Facts.

Carrie A. Beach, mother of plaintiff died testate on November 15, 1951. Her will named the plaintiff Priscilla Alden Beach as beneficiary of a trust. The only other direct heir named was Samuel H. Beach, Jr. only son of decedent and said Samuel H. Beach, Jr. was appointed executor by the will.

Paragraph Third of Carrie A. Beach's will provided:

> "*Third.* I give and bequeath my Beach Lumber Company, Inc., common stock to Rome Trust Company as Trustee, to be administered under the trust for the benefit of my beloved daughter, Priscilla Alden Beach, as provided in Paragraph Fifth herein, and I direct said Rome Trust Company to vote said stock only as directed by my son, Samuel H. Beach, Jr."

Paragraph "Fourth" of said will devised one-half of the rest residue and remainder to Samuel H. Beach Jr. outright.

Paragraph "Fifth" of said will provided:

> "I give, devise and bequeath the other one-half of the rest residue and remainder of my said estate, real and personal of every name and nature and wherever situated unto Rome Trust Company in trust as follows:
>
> To invest and keep invested without restriction to investments legal for trust funds in the State of New York, and with the right to retain the securities, property or investments as held by me at the time of my death and to pay the income therefrom at quarter annual intervals or oftener to my beloved daughter Priscilla Alden Beach during the term of her natural life * * * remainder over to her heirs if any, otherwise remainder to Samuel H. Beach, Jr. or his heirs share and share alike if Samuel H. Beach, Jr. died leaving issue."

Defendant Johnson D. McMahon became counsel for the executor Samuel H. Beach, Jr. and the will was admitted to probate on February 26, 1952. Samuel H. Beach, Jr. did nothing as executor and the plaintiff received no income in the years 1951, 1952 and early 1953. Rome Trust Company did not file an acceptance of the trust until June 11, 1953. The executor Samuel H. Beach, Jr., died on June 30, 1953. No administrators were ever appointed to succeed Samuel H. Beach, Jr. The trust assets were not delivered by Johnson D. McMahon to the Rome Trust Company until September 3, 1953, and plaintiff received a small amount of income in 1953 and 1954 but up to June 15, 1958 the income did not average over $1,200 per year.

The common stock of Beach Lumber Company, Inc., referred to in Paragraph "Third" of the will consisted of 495 shares out of a total of 2,000 shares. Although Samuel H. Beach, Jr., died on June 30, 1953, no proceeding was ever brought in any court to instruct the trustee with respect to title and voting rights to said common stock. Beach Lumber Company books clearly show that company paid only a minimum $1 per share preferred stock dividend 1951-1960 and further show no common stock dividend was declared from November 1951 to 1959 and then the dividend was only $1 per share. In the meantime the Beach Lumber Company piled up a huge undivided surplus of $400,000. Defendant McMahon in addition to being counsel for the Estate of Carrie A. Beach was a director of Rome Trust Company also counsel for Rome Trust Company and finally 1955-1958 (until merger with Oneida National Bank) was a vice-president of Rome Trust Company. The adverse and conflicting relationship of counsel for an estate and officer of a trust company is expressly forbidden by Canon 6, Opinion 10, Canons American Bar Association and is also forbidden by the law of trusts. Furthermore, McMahon was a director of Beach Lumber Company and counsel for Beach Lumber Company 1951 to date.

Procedural Facts.

Plaintiff brought suit on or about June 15, 1958 alleging five causes of action requesting an accounting; alleging breach of trust; requesting removal of trustee, requesting a construction of the will and title to the 495 shares of Beach Lumber Company common stock on the theory of quiet title and resulting trust and finally a cause of action

for fraud and conspiracy alleging McMahon's activities in seven adverse and conflicting capacities resulting in loss by damage to plaintiff for breach of trust by the trustee aided and abetted by McMahon interlocking directorships.

Before action was filed plaintiff requested right to take the deposition of defendant McMahon but the judges of the northern district and particularly Honorable Stephen Brennan manifested their bias and prejudice by refusing not only this request but a subsequent request in the injunction action brought on September 8, 1958.

Motions to dismiss were made by the defendants, claiming lack of jurisdiction and these motions were argued before Hon. James T. Foley and said motions were granted in September 1958 and plaintiff appealed therefrom in October 1958.

About sixty days after plaintiff filed suit in the District Court Northern District of New York; Robert Beach, son of Samuel H. Beach, Jr., deceased under date of June 30, 1953, without any appointment on notice or otherwise as to the plaintiff who resided in California cited plaintiff by constructive service in California to appear on September 8, 1958 so that there could be a judicial settlement of a proposed account in the Estate of Carrie A. Beach. The fraud and mismanagement in the case becomes presumptive under this long lapse of time combined with the refusal of the defendant McMahon to allow any discovery proceedings. In addition the Beach Lumber Company records show no directors or stockholders meetings were held from 1953 to 1959, yet that corporation pretended to pay an unauthorized preferred stock dividend during all these years. But of course no common stock dividend was

declared although Beach Lumber Company had good profits during each of said years and piled up a $400,000 undivided surplus on books kept in such a manner under the last in first out rule on inventory, as to obscure the true nature of the profits realized.

Plaintiff made a request for injunction against the numerous proceedings for settlement of account which was denied by Hon. James Foley in October 1958.

Application for a stay and injunction was denied by the Court of Appeals in January 1959. That Court also subsequently dismissed the injunction proceeding.

However, the first appeal was argued in April 1959 and the Court of Appeals reversed as to the action requesting quieting of title to stock on theory of resulting trust and also on the cause of action for fraud and conspiracy, 269 Fed. 2nd 367. Mandate was recorded in the Northern District of New York in September 1959. Discovery proceedings were then held in October 1959 to January 1960.

Defendants made a series of motions to dismiss on various grounds, failure to state cause of action, failure to name indispensable parties, failure to show jurisdiction of the Court, all of said motions were denied by Judge Foley and the case was noticed for trial on the March 1960 term. By mutual consent of counsel at request of defendants the case was set for trial at the Albany May 1960 term. At a pre-trial hearing in May 1960 defendants requested a stay order from Judge Foley unless plaintiff agreed to drop its opposition to State Court proceedings in connection with the account filed by Robert Beach as a volunteer without appointment or authorization to act in the Estate of Carrie Beach, plaintiff refused to agree and Hon. James

T. Foley granted the defendant a stay order to be removed only after conclusion of all State Court proceedings. This was done although plaintiff had been denied a stay of State Court proceedings so the Federal Court could proceed. This was an arbitrary and unreasonable exercise of discretion to favor the defendants despite the law and equities in plaintiff's favor and in direct contravention of the decisions of this Court in *Payne* v. *Hook*, 7 Wall 425 and *McClellan* v. *Carland*, 217 U. S. 268.

Plaintiff sought to go to trial at the November 1960 Albany term and Judge Foley refused to do so. These actions were in defiance of the mandate. Plaintiff sought relief in the United States Circuit Court, Second Circuit on June 13, 1960, and the application for mandamus was refused.

In the Spring of 1961 plaintiff again had the case on the Syracuse Calendar and Hon. Stephen Brennan finally lifted the stay order of Hon. James T. Foley. Plaintiff was high on the calendar at Albany in May 1960 and within ten numbers on the November 1960 Albany calendar. The case was set by agreement before Judge Stephen Brennan at Syracuse and plaintiff's counsel was ordered to appear for trial on April 10, 1961. A jury was drawn and plaintiff was ready to proceed under the original complaint and mandate of the Court of Appeals. Defendants refused to proceed and Hon. Stephen Brennan, then, at this late date despite the denial of a series of motions addressed to the pleadings and denied by Judge Foley ordered the plaintiffs to amend the complaint. This plaintiff contends constituted a denial of all process of law in violations of Fifth Amendment, United States Constitution.

Plaintiff's counsel reluctantly complied with this ruling on a promise the judge might hear the case in June 1961, but again as at Albany plaintiff lost the benefit of local counsel.

Plaintiff then applied on motion under date of June 5, 1961 for assignment of an outside judge to hear the case but the Court of Appeals refused plaintiff relief under Title 28, U. S. C. Sec. 292 and Sec. 332, for assignment of judge.

Plaintiff whose funds had been exhausted was then unable in September 1961 to proceed to trial and made an application to Hon. Stephen Brennan for an advancement from trust funds admittedly due and payable so that counsel could be retained to try the case. This request was also denied by Judge Brennan, Judge Stephen Brennan in September 1961, ordered the dismissal of the case despite the obvious inability of plaintiff to proceed. Plaintiff personally intervened and threatened an appeal and Hon. Stephen Brennan revoked the dismissal and set the case for pretrial on November 9, 1961.

On November 9, 1961 Hon. Stephen Brennan silenced plaintiff's counsel Robert L. Collins and refused to allow him to answer a series of remarks claiming plaintiff had been responsible for the delay in trial of the case. This further constituted a denial of due process under Amendment V.

Hon. Stephen Brennan compelled plaintiff to try the second cause of action pertaining to her rights under the stock in November 1961 and would not allow a trial of the Second Cause until January 10, 1962. This was a denial of normal judicial procedure and constituted a lack of due process.

Plaintiff's Original Action Brought Under Diversity of Citizenship Clause.

Article III, Section 2.

Title 28 U. S. C. #1332. Diversity of citizenship clause were basis for original action.

Statement of Reasons for Allowance of Writ and Brief.

Public Policy Favors a Hearing.

Petitioner respectfully requests this court grant the writ. (1) An extremely important construction of the law with respect to the duties of a testamentary corporate trustee is involved. In New York State millions of dollars are held in testamentary trusts. The question arises as to whether attorneys and employees of fiduciaries have now escaped all of their obligations by resort to the corporate trustee device. If so there is no power left except this court to rectify the brazen tactics employed by an attorney and corporate trustee to avoid liability for complete diversion of the income of a life estate to the named beneficiary to the heirs in remainder contrary to the express language and obvious intention of a testatrix.

Decision of trial judge taking case from jury followed erroneous theory plaintiff had to come within the ancient action of fraud and deceit although plaintiff's complaint had always been based on constructive fraud theory and had been made law of case. The test of whether plaintiff's case should have gone to jury was whether plaintiff proved a cause of action for breach of trust and conspiracy on a

constructive fraud theory not on whether plaintiff alleged a case under the ancient common law for fraud and deceit.

The measure of proof, required for conspiracy and constructive fraud under the law was clearly met and complied with by plaintiff.

Conspiracy and fraud of a constructive nature such as followed here and proved can be established by circumstantial evidence without direct proof under New York law.

Hughes v. *Bd. of Education,* 37 A. D. 180;
Schenck v. *U. S.,* 253 Fed. 212;
Schine v. *U. S.,* 31 Fed. R. 270, 273;
Finnegan v. *Butler,* 182 N. Y. S. 671.

Trial court ignored fundamental rule that in order to have a fraud and conspiracy case for jury, it is not necessary to show plaintiff's actual fraud and deceit but fraud can be shown from circumstantial evidence. Where a confidential relationship exists as here and proof of conspiracy can be shown from the relationship of the parties, the nature of the acts done, no direct proof is necessary. The jury determines the fraud and conspiracy issue as a fact.

Appellant proved a prima facie case sufficient to compel the defendants to go forward with proof they were not fraudulent. Therefore it was clearly error for the court to direct a verdict for defendants.

Kelly vs. *Jackson,* 6 Peters 622, 632;
Karabagan vs. *The Shickshinny,* 123 Fed. Supp. 99;
Vol. I, Jones on Evidence, Sec. 118.

In the *Karabagan* case, the court said:

> "*Prima facie* evidence is, of course like all evidence, susceptible to rebuttal; but unrebutted it remains sufficient as a matter of law to establish the ultimate proposition it purports to prove."

In the *Kelly* case, *supra*, this court said:

> "What is *prima facie* proof of a fact? It is such as in judgment of law is sufficient to establish the fact; and if not rebutted remains sufficient for that purpose."

So here plaintiff has shown she did not receive dividends; that the trustee did not bring a derivative suit; that the trustee made no concerted effort to sell the stock; that the defendant McMahon was an interlocking director in Beach Lumber Company and Rome Trust Company; that Beach Lumber amassed a huge undivided surplus.

Next, a Writ of Certiorari should be granted because plaintiff's fifth cause of action in the original complaint was held to state a valid cause of action. In that cause of action there were no allegations of fraud and deceit made to attempt to comply with *Hackner* v. *Morgan*, 150 Fed. 2nd 300, the decision used by Judge Brennan to justify his arbitrary action in taking the case of fraud and conspiracy away from the jury and directing a verdict for the defendants. Therefore, the later affirmance of this holding of Judge Brennan constituted a denial of due process of law under Amendment V of United States Constitution and meant in effect that the Court of Appeals, Second Circuit, was not only refusing to enforce its own mandate but it meant that the Judges in the Northern District after two and one half years of refusal to allow the

plaintiff a trial on any basis, finally merely went through the motions of a trial, in effect defying the Court of Appeals and were enforcing their own mandate against the plaintiff and, in effect, were denying the plaintiff of her constitutional right to a jury trial under Amendment VII, United States Constitution.

8 Ill. L. Rev. P. P. 287, 381, 465;
Raytheon v. *Radio Corp.*, 76 Fed. 2nd 943, Affd. 296 U. S. 45.

The question as to whether fraud exists is a clear question of fact, for Jury.

Humes v. *Scruggs*, 94 U. S. 22;
In Re Pierce Butler Co., 246 Fed. 814;
Roaks v. *Am. Brass Co.*, 263 Fed. 2nd 166.

Finally, this court should grant this petition because the trial judge and the Court of Appeals refused to follow the law of New York with respect to constructive fraud. This decision if allowed to stand means that a beneficiary of a testamentary trust in New York State has no redress for fraud in administration of an estate and that the intent of a testator means nothing. Under the doctrine of *Hackner* v. *Morgan*, 130 Fed. 2nd 300 if applied to the instant case in effect deprives a beneficiary of all remedy in a similar situation which recently arose in Indiana. Thus in the case of *Voelkel* v. *Tohulka*, 141 N. E. 2nd 347 at 349, 236 Ind. 588, the court had before it a situation in which an heir agreed with the testator to hold proceeds of an insurance policy for the benefit of another heir and later repudiated the promise. The court held with respect to confidential relationship and constructive fraud that the modern view

demanded the doctrine of constructive fraud be applied and cited Vol. I, Scott on Trusts, Sec. 55.1. See also *Windle* v. *City of Valparaiso*, 115 N. E. 429, where the court held that constructive fraud or fraud in law may consist of any breach of duty which might later have the *effect* of intentional fraud. (Italics are petitioners.)

II.

Appellant by proving testamentary trust and her life estate made out *prima facie* case *in* suit against trustee for constructive fraud where family corporation accumulated huge surplus and trustee failed to bring derivative suit to compel declaration of dividends.

Butler vs. *Prentiss*, 158 N. Y. 49, 52 N. E. 652;
Trice vs. *Comstock*, 121 Fed. 622, 623, 61 L. R. A. 176;
Younglove vs. *Hacket* (Calif.), 59 Pac. 2nd 451;
Pomeroy, Vol. 3, Equity Juris. p. 790 et seq., Sec. 956;
Mead vs. *Gilbert*, 170 Md. 592, 185 At. 668, 674.

The trial court held that unless plaintiff alleged and proved a cause of action for fraud and deceit that the case could not go to the jury. Under the above authorities we contend that this ruling was completely in error. Plaintiff proved a perfect case of constructive fraud and this issue should have been put to the jury under proper instruction.

The New York law as laid down in the case of *Butler* v. *Prentiss*, 158 N. Y. 49, 52 N. E. 652 is clearly in accord with the weight of authority. That case holds "constructive fraud, however, sometimes called legal fraud" is, never-

theless, fraud although it rests more upon presumption, and less upon furtive intent, than moral fraud." "Where fiduciary relations exist, and a condition of superiority is held by one of the parties, over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively, its compliance with equitable requisites and of thereby overcoming the presumption, Pom. Eq. Jur., Vol. 3, Sec. 956."

This doctrine of constructive fraud is affirmed in the case of *Younglove* v. *Hacker,* 59 Pac. 2nd 451 at 454, where the Supreme Court of Oregon said:

> "In the instant case the appellant assumed the position of trustee for the purpose of protecting the interest of the plaintiff and absolutely did nothing and the record fails to disclose any excuse whatever for his inaction. This we think, constitutes constructive fraud."

Defendant McMahon violated rules prohibitory assumption of adverse and conflicting duties.

Res. Law of Agency, Sec. 394;
In Re Bond and Mortgage Co., 97 N. Y. S. 2nd 89; aff. 277 A. D. 1132; 101 N. Y. S. 2nd 217;
Smallwood vs. *Overseas Storage Co.,* 263 A. D. 609; 33 N. Y. S. 2nd 876, aff. 289 N. Y. 827;
Globe Woolen Co. vs. *Utica Gas Co.,* 224 N. Y. 483;
In Re Grossman's Estate, 283 N. Y. S. 2nd 323; aff. 294 N. Y. S. 942;
Vol. 2, Scott on Trusts, Sec. 170, 205.

In *Smallwood* vs. *Overseas Storage Co.*, 33 N. Y. S. 2d 876, 263 A. D. 609, the court said:

> "The general rule is that a lawyer may not represent adverse interests or undertake to discharge conflicting duties. * * * A lawyer in the absence of a complete disclosure may not act for conflicting interests where a disadvantage or detriment arises, or is likely to arise, to one of the interests for which he acts. This is so irrespective of the suffering of damage in the ordinary sense."

Scott on Trusts, Vol. 2, Secs. 170 and 205 provide as follows:

> "It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries. He is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries."

#205 Liability (of trustee) in case of breach of trust:

> "Where the trustee commits a breach of trust resulting in the failure to make a gain which would otherwise have accrued to the trust estate, the trustee is chargeable with the amount of gain which would have accrued."

Bogert on Trusts, Vol. III, Sec. 543 (loyalty) Sec. 481, p. 79:

> "#481. Violation of duty makes fiduciary a constructive trustee:
>
> (Trustees) are held to the highest amount of good faith, are prohibited from putting themselves in positions where personal interests and representative interest will conflict."

Plaintiff proved a resulting trust occurred upon the death of Samuel H. Beach, Jr., as to the 495 shares of Beach Lumber Company common stock.

The opinion of Judge Brennan completely ignores the fact that testatrix clearly did not place trust in Rome Trust Company to vote the shares. Hence, to hold as the trial court has done ignores the holding in *Charter* v. *Carter*, 238 U. S. 572, and the intent of testatrix.

Wherefore, petitioner respectfully requests that this court grant a Writ of Certiorari to the United States Court of Appeals, Second Circuit, and that the holding of the trial court be reversed and plaintiff be granted relief.

Respectfully submitted,

WILLIAM B. COLLINS,
ROBERT L. COLLINS,
HAROLD BLODGETT,
Counsels for Petitioner.

APPENDIX.

Opinion.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 279-280—OCTOBER TERM, 1958

Argued April 23, 1959 Decided August 17, 1959

Docket Nos. 25416-7.

PRISCILLA ALDEN BEACH,

Plaintiff-Appellant,

vs.

ROME TRUST COMPANY, a domestic corporation, and JOHNSON D. MCMAHON, and ROBERT BEACH, Administrator CTA of the Goods and Chattels of the Estate of Carrie A. Beach, Deceased,

Defendants-Appellees.

PRISCILLA ALDEN BEACH,

Plaintiff-Appellant,

vs.

J. MAYNARD JONES, Surrogate of Oneida County, State of New York; ROME TRUST COMPANY, a New York Banking & Trust Company; JOHNSON D. MCMAHON, individually and as Vice-President of Rome Trust Company; DIRECTOR OF BEACH LUMBER COMPANY, a New York Corporation; COUNSEL FOR ROME TRUST COMPANY; COUNSEL FOR BEACH LUMBER COMPANY; COUNSEL FOR THE ESTATE OF CARRIE A. BEACH, Deceased; COUNSEL FOR ROBERT BEACH; COUNSEL FOR THE ESTATE OF SAMUEL M. BEACH, JR.; ROBERT BEACH, individually and as Executor of the Estate of Samuel M. Beach, Jr.,

Defendants-Appellees.

Before:

LUMBARD, *Circuit Judge.*
GALSTON and ANDERSON, *District Judges.*

Opinion.

LUMBARD, *Circuit Judge:*

These appeals are from orders of James T. Foley, J., in the District Court for the Northern District of New York declining jurisdiction in favor of the Surrogate's Court of Oneida County, New York, in a diversity action brought by the beneficiary of a testamentery trust which was created out of an estate then and now in the course of administration in the Surrogate's Court, against the administrator C. T. A., a testamentary trustee under letters of trusteeship issued by the Surrogate, and an attorney alleged to have participated with them in certain breaches of trust. In the first action Judge Foley declined jurisdiction. The second action was brought for an injunction against proceedings for an accounting in the Surrogate's Court, subsequently commenced by defendants, and the cause was dismissed for the reasons which governed the first disposition.

We hold that as to those claims the prosecution of which would constitute an interference with the previously attached quasi in rem jurisdiction of the Surrogate's Court the district court's order of dismissal was correct; but that insofar as the plaintiff's claims would not interfere with such a prior jurisdiction, it was improper either to dismiss them, or to retain them and then abstain from the exercise of jurisdiction. We hold further that for the reasons set forth at length in *Sullivan* v. *Title Guarantee & Trust Co.*, 167 F. 2d 393 (2 Cir. 1948), Judge Foley correctly declined to enjoin the subsequently initiated proceedings in the Surrogate's Court.

The facts alleged in the complaint and taken as true for present purposes, are briefly as follows. Plaintiff's father, Samuel H. Beach, Sr., died testate in 1941 leaving a will which made his wife, Carrie A. Beach, the sole heir and distributee of his estate, but which, in provisions that would have been effective had Carrie predeceased Samuel, manifested as intention that the two children of Carrie and

Samuel, the plaintiff, Priscilla Alden Beach, and Samuel H. Beach, Jr., share equally in the estate. Carrie Beach died on November 15, 1951 leaving a will which, according to the complaint, purported to carry out the wishes of Samuel, and therefore to divide the estate equally between Priscilla and Samuel, Jr. The will of Carrie, which is annexed to the complaint, provided in terms for outright gifts of personalty and realty to Samuel, Jr., for a gift in trust to Priscilla for life of common stock in the Beach Lumber Co. and one-half the residue of the estate, and for an absolute gift of the remaining one-half of the residue to Samuel, Jr. Under the terms of the trust the issue of Priscilla are remaindermen, but in default of such issue, Samuel, Jr or his issue are designated. Under the terms of the trust the designated trustee, the Rome Trust Company, was instructed to vote the Beach Lumber Co. common stock "only as directed by my son, Samuel H. Beach, Jr," and was expressly given the power to retain investments held at the death of the testatrix and to invest the corpus without restriction to investments legal for trust funds in the State of New York.

Upon the death of Carrie, Samuel, Jr. became the administrator C. T. A. of her estate under the terms of the will which was admitted to probate February 26, 1952, and in 1953 the Rome Trust Company assumed its duties as trustee, receiving, amongst other securities, the common stock of Beach Lumber Co. Very shortly thereafter Samuel, Jr. died, and Robert J. Beach, his son; was named his administrator C. T. A., as well as administrator C. T. A. of Carrie's estate. None of the several fiduciaries thus involved with the assets of the estate of Carrie have as yet rendered an accounting despite plaintiff's demands that they do so. Plaintiff has received income in the amount of $1,500 per year from the trustee.

Johnson D. McMahon was counsel to Carrie Beach, and to Samuel Beach, Jr., and is presently counsel to and a

director and vice-president of the Rome Trust Company, as well as counsel to and a director of the Beach Lumber Company. Robert J. Beach has succeeded his father as president of the Beach Lumber Company, and holds all the stock of the company which is not in the trust.

The correctness of the decision below necessarily turns upon the nature of the claims asserted in the complaint, and accordingly we now consider them in some detail. The complaint, which, as the district court noted, is very loosely drawn, alleges five causes of action against various combinations of defendants. The first cause of action seeks an accounting of the estate and of the trust to determine whether the trustee in fact received the proper portion of the residue, it being alleged on information and belief that the total estate of Carrie was in the neighborhood of $300,000. Plaintiff in part derives this figure from the fact that the estate of Samuel, Jr. was valued at about $200,000. She apparently asserts that the trust estate should be about equal to this sum, although it is not alleged that Samuel, Jr. was without other income, and it appears from affirmative allegations that he served actively as chief officer of Beach Lumber Company. While the complaint refers to plaintiff as if she were the legal and equitable owner of one-half of the Carrie estate, there is no allegation that she is anything other than a life beneficiary of the trust established by the will. Plaintiff sets forth her income from the trust as $1,500 per year, and alleges that as against the supposed corpus, presumably $150,000, her income reveals a corpus of only $25,000, at 6%.

The second cause of action alleges a breach of trust in the retention by the trustee of the stock of Beach Lumber after the death of Samuel, Jr., since he could then no longer supervise the voting of it, and since the investment, as measured by its yield to the plaintiff, and the apparently small increase in the net worth of the company over the

relevant years, was a poor and therefore an improper one. Although in this cause of action there are vague assertions that there was a concert of action between Robert Beach, Rome Trust Company, and McMahon, the only relief sought is (1) damages against the Rome Trust Company for breach of trust in the wrongful retention of the stock and in failing to account earlier, such damages to be ascertained by an accounting of the past and present value of the investment; and (2) removal of the Rome Trust Company as trustee.

The third cause of action is confusingly stated, but it appears to be alleged that plaintiff has been the legal owner of the stock of the Beach Lumber Company held by the trust since the death of Samuel, Jr., and that plaintiff should be declared legal and equitable owner. Whether this result is asserted to derive from a construction of the will itself, or to be the equitable relief appropriate to the breaches of the trust alleged, is not plain. It is however elsewhere generally alleged that McMahon as counsel to Carrie and Samuel, Jr., so prevailed upon them as to have prevented them from vesting the plaintiff with an outright one-half interest which they and Samuel, Sr. intended that she have.

The fourth cause appears to depend on the third, in that it is claimed that the retention of the stock by the Rome Trust Company rendered it a constructive trustee for plaintiff's benefit; but the relief demanded is damages in the amount of $250,000.

Finally, the plaintiff alleges a conspiracy between the several defendants led by McMahon to prevent the Beach Lumber Company from paying dividends and thereby to deprive the plaintiff of benefits under the trust. Although it is alleged as a conclusion that McMahon's behavior was fraudulent, all that is detailed is that he participated with or gave advice to several persons or companies whose posi-

tions vis-a-vis the plaintiff are adverse and thus aided in a breach of the trust duties of the testamentary fiduciary.

In a summary of the relief sought plaintiff demands an accounting of the estates of Samuel, Sr. and Carrie Beach and of the Beach Lumber Company; removal of Rome Trust Company as trustee, and damages from it for breach of trust; adjudication of and declaration of title to the Beach Lumber shares and an order turning them over to plaintiff; damages against McMahon as co-conspirator with the Rome Trust Company; and such other and further relief as is proper.

We turn now to consideration of the primary issue presented, whether the district court properly declined to take jurisdiction of the controversy presented despite the presence of the requisite allegations of diversity of citizenship and jurisdictional amount.

It is apparent from the facts set forth in the complaint that the estate of Carrie Beach and the trust which is composed of roughly half of its assets, are still in the process of administration in the Surrogate's Court of Oneida County. Since an accounting has not yet been had of the estate itself, and since any full accounting of the trust assets at this time would necessarily anticipate and interfere with it, plaintiff's demands for accounting of the estate and trust and removal of the trustee fall within the rule that a previously attached quasi in re-jurisdiction of property in a state court requires a federal court to dismiss any claim with regard to the property where the adjudication would interfere with the proceedings in the state court. See, e.g., *Princess Lida* v. *Thompson*, 305 U. S. 438 (1939); *Penn Co.* v. *Pennsylvania*, 294 U. S. 189, 195 (1935). This principle is so firmly rooted in our law as to have required and not merely permitted Judge Foley to dismiss the plaintiff's claims insofar as they sought an accounting of the estate and trust.

The same rule governs the plaintiff's demand for a distribution to her of the common and preferred stock of Beach Lumber Company, since such a distribution before final accounting would run the hazard of conflict with the Surrogate's determination of the accounts of both the trust and the estate. See *United States* v. *Bank of New York Co.*, 296 U. S. 463, 478 (1936); *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 44-46 (1909).

It has been argued that since the New York court of general jurisdiction, the Supreme Court, concededly has jurisdiction to adjudicate these claims despite the status of proceedings in the Surrogate's Court, the district court therefore ought to have gone forward. But the fact that the Supreme Court of New York has coordinate jurisdiction of these claims could affect the rule of the *Princess Lida* case only to the extent that it demonstrated that the action in the Surrogate's Court was not in fact dependent upon the property in its possession, and was therefore in personam rather than quasi in rem; and this possibility we think is amply rebutted by the fact that it is apparent that the Supreme Court would itself decline jurisdiction of these claims in favor of the Surrogate's Court provided only that it appeared that the Surrogate was empowered to give full relief. See *Sullivan* v. *Title Guarantee & Trust Co., supra*, and cases cited. It is the policy of the New York courts to concentrate in the hands of the Surrogate all matters affecting the administration of estates, and this policy appears to proceed from, or indeed to define, the nature of the Surrogate's jurisdiction as quasi in rem.

As to the several of the claims presented, however, the matter is different. Insofar as the third cause of action seeks a construction of the will of Carrie Beach to declare plaintiff the owner of the stock she claims, and not a distribution of specific property, its prosecution would not constitute an interference with the jurisdiction of the Sur-

rogate and the claim is therefore not within the rule above discussed. From the earliest probate cases in the federal courts a definite if not always precise line has been drawn between claims seeking to contest management or to effect a distribution of property, and those merely seeking a judgment in personam declaring the plaintiff entitled to receive from the fiduciary an interest in the estate. See e. g., *Waterman* v. *Canal-Louisiana Bank Co., supra.* It has consistently been held that in a case between diverse citizens the federal courts will determine a controversy concerning the right of the plaintiff to share in the res; while it has at the same time been established that they will decline to undertake the general administration of the property. If this distinction is applicable in the present case then it follows that Judge Foley improperly concluded that because the plaintiff's claim to the stock as legal owner would present a question of will construction it was therefore within the conclusive jurisdiction of the Surrogate.

However, it is argued, in reliance upon our decision in *Sullivan* v. *Title Guarantee & Trust Co., supra,* that because it plainly appears that event as to this claim the Supreme Court would defer to the jurisdiction of the Surrogate, the district court, under the rule of *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945), was bound to do the same. The contention thus presented is a novel one, which was not decided in the *Sullivan* case. We are urged to hold that when a state places matters otherwise within federal jurisdiction within the effectively exclusive jurisdiction of a specialized court, it therefore and without regard to the nature of the proceeding compels the federal courts to reject the action and thereby to contract their jurisdiction. In the *Sullivan* case we were confronted primarily with the question of the propriety of an injunction against state court proceedings. We held in part that the policy of the

Guaranty Trust case that a federal diversity court sits as another court of the state as to all matters determinative of the outcome of the proceeding, made it singularly inappropriate that a federal court exercise its discretionary power to enjoin it, but would defer to its exercise of jurisdiction. We are concerned here not with the discretionary power of equity in the sensitive area of enjoining proceedings in another forum, but with the power of a federal court to hear a matter which does not interfere with the proceedings in the Surrogate's Court.

Since appellees do not urge that the courts of New York would decline to hear the claim advanced, cf. *Angel* v. *Bullington*, 330 U. S. 183 (1947); *Guaranty Trust Co.* v. *York, supra*, it appears that their argument that the district court was bound by the *Guaranty Trust* doctrine to decline the action depends upon the further assertion that the effectively exclusive vesting of it by New York in a "probate" court thereby removed it from federal power. It is of course true that as to purely probate matters the federal courts are without jurisdiction since the English High Court of Chancery had no jurisdiction of such matters in 1789. See, e. g., *Farrell* v. *O'Brien*, 199 U. S. 89, 103 et seq. (1905) and cases cited. But it was early established that as to controversies that were not then regarded as probate matters federal jurisdiction could not be ousted by the mere internal arrangement of the state courts, see e. g., *McClellan* v. *Carland*, 217 U. S. 268, 281-82 (1910); *Waperman* v. *Canal-Louisiana Bank Co., supra; Borer* v. *Chapman*, 119 U. S. 587 (1887); *Hess* v. *Reynolds*, 113 U. S. 73 (1885); *Gaines* v. *Fuentes*, 92 U. S. (2 Otto) 10 (1875), and it is therefore plain that the mere fact that an ordinary action for equitable relief is placed by New York in the effectively exclusive jurisdiction of the "probate" court, see *Matter of Raymond O. Davis*, 246 N. Y. 57 (1923), is irrelevant to the existence of power to hear the cause.

With this defect the entire argument based upon the *Guaranty Trust* case must fall. It is not suggested that there would be the slightest difference in outcome between litigation in the district court and litigation in the available state court. Cf. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956). Indeed appellees have been at pains to argue that the opposite is the case, and that precisely the same relief is available in the three forums concerned. It is therefore apparent that the transfer of cases from the Supreme Court to the Surrogate's Court is no more, for present purposes, than a change of venue. Such a change is utterly insufficient to invoke the vital doctrine of the *Guaranty Trust* case.

Similar considerations govern the disposition of plaintiff's claims of breach of trust and mismanagement against the Rome Trust Company. *Princess Lida* v. *Thompson*, *supra*, establishes that jurisdiction of such claims ought to be declined by a federal court when an accounting proceeding which, under state law, is quasi in rem has been previously commenced in the state courts. That rule plainly governs here provided that there is a previously attached jurisdiction over the trust in the Surrogate's Court for Oneida County. We considered a substantially identical question in the case of *Sullivan* v. *Title Guarantee & Trust Co.*, *supra*, where the issue of the existence of any jurisdiction whatever over this kind of claim in the district court was presented. After a careful review of the duties and organization of the relevant New York courts we conclude that the jurisdiction of the Surrogate over testamentary trustees would not prevent claims such as these for money damages from being heard in the district court at least when no previously instituted proceeding for an accounting was pending. We see no reason to revise that determination now, and accordingly we conclude that as to these claims there was jurisdiction in the district court.

We turn finally to the crucial issue in this case, whether despite the existence of subject matter jurisdiction over certain of the plaintiff's claims, it was within Judge Foley's power to decline to proceed with them and to dismiss the action in its entirety.

One aspect of this question is clear. In no event did the district court have power to decline jurisdiction and to dismiss such of the claims presented as ought to have been found to be within the subject matter jurisdiction of the district court and not to be an interference with a previously attached quasi in rem jurisdiction in the Surrogate's Court. Such power as the district court may have to defer to the Surrogate must be employed by abstention from the exercise, but not from the assumption, of jurisdiction. See, e. g., *County of Allegheny* v. *Mashuda*, —— U. S. —— (June 8, 1959).

The final question remains whether it would have been appropriate for Judge Foley to obtain from the exercise of jurisdiction in favor of the accounting proceeding subsequently commenced in the Surrogate's Court. It is now unequivocally established that the federal courts whether sitting in law or in equity have the power in appropriate circumstances to decline to exercise the jurisdiction which they possess. See *Louisiana Power & Light Co.* v. *City of Thibodaux*, U. S. (June 8, 1959). But it is equally well established that such a power to abstain is conditioned upon the existance of extraordinary circumstances touching what Mr. Justice Frankfurter in the *Louisiana Power & Light* case described as a policy derived from the nature of our federalism. While the Supreme Court has "increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law," it has continued to recognize that "the mere difficulty of state law does not justify a federal court's relinquishment of jurisdiction in favor of

a state court action." *Louisiana Power & Light Co.* v. *City of Thibodaux, supra.* An examination of the *Louisiana* case will provide the solution to the question whether such extraordinary circumstances as would justify abstention are presented here. There as here the district court had exercised its judgment to decline to adjudicate the action, so there was no question of the propriety of compelling an exercise of discretion which had been declined. The Court divided 6 to 3 on the propriety of the abstention despite the fact that it was acknowledged by all that the question of state law involved turned upon the construction of a state statute without benefit of judicial decision in the state courts, and that the relief sought, an expropriation of the Company's property by the City, presented serious questions of the internal distribution of governmental powers among the divisions of state authority. "Caught between the language of an old but uninterpreted statute and the pronouncement of the Attorney General of Louisiana, the district judge determined to solve his conscientious perplexity by directing utilization of the legal resources of Louisiana for a prompt ascertainment of meaning through the only tribunal whose interpretation could be controlling —the Supreme Court of Louisiana." The majority found that justification for this power in the district court "lies in regard for the respective competence of the state and federal court systems, and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State."

It is not even suggested that such compelling circumstances exist here. In support of Judge Foley's power to abstain we are told only that the Surrogates' Courts commonly handle such questions. Of course they do; but so do the federal courts. No controlling or obscure question of state law is presented on this complaint; and no specialized executive regulatory agency is concerned. Cf. *Pennsylvania*

v. *Williams*, 294 U. S. 176 (1935). We are faced only with the decision of New York to put certain matters of ordinary equitable and legal cognizance within the substantially exclusive control of a particular court. It is plain that no abstention from the exercise of jurisdiction should be sustained in such circumstances if the conditions governing the propriety of the assumption of jurisdiction otherwise obtain. *County of Allegheny, supra; McClellan* v. *Carland, supra.* In a case as this "the party properly situated has a right, given by the Constitution of the United States, to have (his claims) tried * * * in a court of the United States, which cannot be defeated by State statutes, enacted for the more convenient settlement of estates of decedents." *Hess* v. *Reynolds, supra* at 77; see also *Payne* v. *Hook*, 74 U. S. (7 Wall.) 425 (1869).

The decision below insofar as it dismissed plaintiff's claims for a declaration of her alleged legal ownership of certain assets, and for breach of trust against the Rome Trust Company and McMahon is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

For the reasons set forth at length in *Sullivan* v. *Title Guarantee & Trust Co., supra,* we affirm Judge Foley's refusal to enjoin the subsequently initiated proceedings in the Surrogate's Court.

Memorandum—Decision.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK.

PRISCILLA ALDEN BEACH, a/k/a PRISCILLA A. HICKEY,
Plaintiff,

vs.

ONEIDA NATIONAL BANK & TRUST COMPANY OF CENTRAL NEW YORK (successor to ROME TRUST COMPANY) and JOHNSON D. McMAHON,
Defendants.

Civil No. 7116.

Appearances:

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ACTION TO DECLARE THE OWNERSHIP OF SHARES OF STOCK.

Tried Nov. 9, 1961; Submitted Dec. 8, 1961; Decided Dec. 18, 1961.

Memorandum—Decision.

BRENNAN, *Judge.*

This action presents a facet of the litigation involving the estate of Carrie A. Beach, deceased. Related problems have received the consideration of both state and federal courts. *Beach* v. *Rome Trust Co.*, 269 F. 2d 367; *In the Matter of the Estate of Carrie A. Beach, deceased*, 9 A. D. 2d 636 and 12 A. D. 2d 735. The decision in *Beach* v. *Rome Trust Co., supra*, held in effect that this court has jurisdiction to adjudicate plaintiff's claim of legal ownership of certain assets of the estate and of her claim for damages arising from an alleged breach of trust.

Because of the confused condition of plaintiff's complaint, both as to allegations and parties, this court permitted an amendment of the complaint relative to the two causes of action over which this court has jurisdiction as determined above. Such amended complaint appears in no way to change the cause of action insofar as the claim for a determination of ownership of assets is concerned but appears to rest upon a conspiracy to defraud plaintiff of her interest in her mother's estate insofar as the claim of breach of trust is concerned.

At a pretrial conference, it was determined that the issue as to the ownership of said assets as claimed by the plaintiff should be first determined by the court and the conspiracy to defraud be tried to a jury at the opening of court on January 9, 1962. Accordingly, evidence was presented as to the ownership issue, the contentions briefed and the question of ownership of the assets is before the court for decision. The facts disclosed are not complicated or essentially disputed and, so far as material here, are set out below.

Carrie A. Beach died November 15, 1951, leaving her surviving a daughter, the plaintiff, Priscilla Alden Beach, and a son, Samuel H. Beach, Jr. The last will and testament of said deceased, dated February 3, 1950, was there-

after probated in the Surrogate's Court of Oneida County. Under the terms of the will, the deceased devised to her son, Samuel H. Beach, Jr., the home and premises at Rome, N. Y., and the household contents contained therein, together with one-half of the remainder of her estate after placing in trust for plaintiff the common stock of the Beach Lumber Company owned by the deceased. The testamentary disposition vested absolute ownership in Samuel H. Beach, Jr. while the benefits accruing to the plaintiff were limited by a created trust.

The two paragraphs of the will of Carrie A. Beach, which are involved in this litigation, are paragraph third and fifth which are set out in full below—

> "THIRD. I give and bequeath my Beach Lumber Company, Inc., common stock, to Rome Trust Company as Trustee, to be administered under the Trust for the benefit of my beloved daughter, Priscilla Alden Beach, as provided in Paragraph Fifth herein, and I direct said Rome Trust Company to vote said stock only as directed by my son, Samuel H. Beach, Jr.
>
> FIFTH. I give, devise and bequeth the other one-half of the rest, residue and remainder of my said estate, real and personal of every name and nature and wherever situated unto Rome Trust Company in trust as follows:
>
> To invest and keep invested without restriction to investments legal for trust funds in the State of New York, and with the right to retain the securities, property or investments as held by me at the time of my death and to pay the income therefrom at quarter annual intervals or oftener to my beloved daughter, Priscilla Alden Beach, during the term of her natural life and upon her death, if she leave issue, her surviving, I direct my said trustee to pay

over the said share of my estate to such issue, otherwise to my beloved son, Samuel H. Beach, Jr., or if he shall have died leaving issue, then I direct my said trustee to pay the said share to such issue, equally share and share alike."

The plaintiff, beneficiary of said trust, is fifty-nine years of age. She has no issue.

Samuel H. Beach Jr. died June 30, 1953, leaving as his issue a son Robert Beach and a daughter Patricia B. Murphy, neither of whom is a party to this action.

The Rome Trust Company, the named trustee in the will of Carrie A. Beach, duly qualified and acted as such trustee until January 8, 1958 when it was merged with the Oneida National Bank and Trust Company which is the named defendant herein and present trustee. Since the pertinent events involved here took place prior to the merger, the defendant will be ordinarily referred to herein as the Rome Trust Company.

Among the assets of said trust are 495 shares of the common stock of the Beach Lumber Company which said trustee received and holds under the provisions of paragraph third and fifth of the will of Carrie A. Beach as set forth above. The ownership of said stock is the only item of trust property involved in this particular litigation. Although this cause of action is occasionally referred to in arguments and briefs as a construction of a will and was so referred to in *Beach* v. *Rome Trust Co.*, *supra*; at page 372, it may more properly be termed as a declaratory judgment action determining the ownership of said stock.

It is fundamental that a court may not rewrite a will while professing to construe and that an ambiguity must exist therein as the basis of such an action. It is the court's understanding that petitioner has abandoned any claim that the provisions of the will above referred to require construction as that term is used in similar litigated mat-

ters. In fact, the sole contention of the plaintiff as set forth in her brief is as follows:

> "Upon the death of Samuel H. Beach, Jr., fee title to the 495 shares of common stock reverted by resulting trust to the estate of Carrie A. Beach and Rome Trust Company became the constructive trustee of said shares, holding title for Priscilla Alden Beach and subject to her order".

After eliminating irrelevant statements of fact and theory in plaintiff's submitted brief, plaintiff's contention rests upon the assertion that upon the death of Samuel H. Beach, Jr. on June 30, 1953, the trust failed and the stock has been held by the trustee since that date under a resulting or constructive trust for the benefit of the plaintiff who should be held to have obtained title thereto by reason of such failure. This court finds neither facts nor applicable law which would sustain the above contention.

Generally speaking a trust fails when its object has been accomplished. No fault is found with the cases cited by the plaintiff which in effect hold that a trust fails upon the death of the beneficiary. *Chater* v. *Carter*, 238 U. S. 572; *Matter of Haber*, 281 A. D. 383, or upon the cessation of the use of the trusted property for the purpose for which it was intended. *Hopkins* v. *Grimshaw*, 165 U. S. 342. This is not the situation here. The trust is measured by the life of Priscilla Alden Beach—not by the life of Samuel H. Beach, Jr. His death did not destroy its vitality. The provision of the trust instrument requiring that the trustee vote the stock as directed by the son of the testator was a limitation of power of the trustee and in no way damaged its title. Such a provision is entirely legal. *Matter of Feinson*, 196 Misc. 590 at 592-593 and cases cited. Since the document is the sole charter of authority possessed by the trustee, the only effect of the death of Samuel H. Beach,

Excerpts from Argument on Motion for Directed Verdict in Lieu of Opinion.

Jr. was to remove the limitation upon the trustee's power to vote the stock. Further discussion would seem unnecessary since the plaintiff cites no authority to sustain her contention.

Defendants' contentions, as to the absence of indispensable parties and the effect of the decree of judicial settlement of the Estate of Carrie A. Beach, are noted but will not be considered or passed upon. The decision may better rest upon the conclusion that plaintiff has failed upon the merits to establish her asserted claim.

The facts recited as above will be considered as the findings of this court and it is concluded that plaintiff has failed to establish her claim of ownership of the stock involved and that this claim or cause of action should be dismissed.

Judgment is directed as above. The actual docketing of said judgment by the Clerk will be withheld until the disposition of the remaining cause of action in plaintiff's complaint is made on January 9, 1962.

STEPHEN W. BRENNAN,
United States District Judge.

Excerpts from Argument on Motion for Directed Verdict in Lieu of Opinion.

(149) Mr. Collins: All we say is that McMahon did what he did and the way this was manipulated here in carrying out the provisions of the mother's Will and it (150) constituted a fraud in law upon our client in that he didn't carry out those provisions. You say "where is the representation"? It is right in the Will.

Excerpts from Argument on Motion for Directed Verdict in Lieu of Opinion.

The Court: But the Rome Trust Company didn't draw the Will.

Mr. Collins: But they accepted the trust and they accepted the terms of it.

* * * * * *

(146) Mr. Collins: Well, what were you reading from, if Your Honor please?

The Court: This is 130, an opinion by Judge Case, Judges Clark and Frank (Hackner v. Morgan), 130 F. 2d 300. The case is unimportant. It is a very short concise statement, and that is the only reason I use it. It defines the five elements of fraud. Here they are again.

Mr. Collins: I am familiar with those elements, but that is not our case. We are going under the theory of the Geddes vs. Anaconda Copper Corporation case, 254 U. S. 590. (147) We are also using the theory of Judge Cardozo in the Minehart vs. Salmon case which involves contracts. Although the man never voted on contracts between the two corporations, they held that his silence alone, where he was the dominant member, such as McMahon, that that silence alone was enough to make him guilty of fraud.

The Court: Oh yes, they teach that to you in Law School. I am familiar with it.

Mr. Collins: Well, that is the law of New York.

The Court: Yes sir.

* * * * * *

Opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 381—September Term, 1961.
(Argued June 11, 1962 Decided June 11, 1962.)
Docket No. 27548

PRISCILLA ALDEN BEACH,

Plaintiff-Appellant,

v.

ONEIDA NATIONAL BANK AND TRUST COMPANY OF CENTRAL NEW YORK (successor to Rome Trust Company) and JOHNSON D. McMAHON,

Defendants-Appellees.

Before:

FRIENDLY, KAUFMAN and HAYS, *Circuit Judges.*

Plaintiff appeals from a judgment of the District Court for the Northern District of New York, Stephen W. Brennan, *Chief Judge,* after remand from this Court, 269 F. 2d 367, dismissing claim for a determination that plaintiff had become beneficial owner of certain stock, and directing verdict for defendants on claim for breach of trust, fraud etc. Affirmed.

Opinion.

ROBERT L. COLLINS (Harold Blodgett on brief), Schenectady, N. Y., for Plaintiff-Appellant.

JAMES T. GRIFFIN (O'Shea, Griffin, Jones & McLaughlin), Rome, N. Y., for Defendant-Appellee The Oneida National Bank and Trust Company of Central New York.

DONALD L. AUSTIN (Johnson D. McMahon), Rome, N. Y., for Defendant-Appellee Johnson D. McMahon.

PER CURIAM:

We affirm the judgment in open court. The claim with respect to ownership of the stock was properly dismissed for reasons well stated in Judge Brennan's memorandum-decision of December 18, 1961. Plaintiff failed to adduce evidence sufficient to warrant submission to the jury of her claim for breach of trust, fraud, and conspiracy in the administration of the trust.

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IN THE

Supreme Court of the United States

October Term, 1962.

No. **465** Miscellaneous.

PRISCILLA ALDEN BEACH, a/k/a PRISCILLA A. HICKEY, Widow,

Plaintiff,

vs.

ONEIDA NATIONAL BANK AND TRUST COMPANY OF CENTRAL NEW YORK (successor to Rome Trust Company) and JOHNSON D. McMAHON,

Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

Brief for Respondent, Oneida National Bank and Trust Company of Central New York in Opposition.

Counsel for Respondent, Oneida National Bank and Trust Company of Central New York:

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THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4131—1962

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In the

Supreme Court of the United States

October Term, 1962.

No. Miscellaneous.

Priscilla Alden Beach, a/k/a Priscilla A. Hickey, Widow,

Plaintiff

vs.

Oneida National Bank and Trust Company of Central New York (Successor to Rome Trust Company) and Johnson D. McMahon,

Defendants.

Brief for Respondent Oneida National Bank and Trust Company of Central New York in Oppo ition to Petition for Writ of Certiorari.

Statement.

There are so many inaccuracies and omissions in the petition, including that portion thereof entitled "Procedural Facts" at pages 10 through 14, that it is deemed necessary to correct some of them. For the sake of brevity, the page number of the petition at which an inaccurate statement appears is set forth at the beginning of a paragraph herein.

Page 3. The statement that plaintiff's brother, as executor of their mother's estate, "did absolutely nothing prior to his death on June 30, 1953" is false. For ex-

ample, prior to his death, both state and federal transfer tax returns were filed, and the instruments necessary to effect stock transfers were executed.

Page 4. The statement that the Trial Judges in the northern district "deliberately prevented plaintiff from securing a jury trial of this case" is false, and so is the statement that the case was "on the ready calendar from March, 1960 to June, 1961."

Page 5. The statement that Judge Brennan "would not allow plaintiff to try the case under the original complaint and ordered plaintiff to amend the complaint" and "to omit all reference to fraud, with a charge merely of negligence" is absolutely false.

Page 11. The statement that Robert Beach, "without any appointment on notice or otherwise as to the plaintiff * * * cited plaintiff by constructive service in California" to appear in the Surrogate's Court proceeding, is false. The petitioner in that proceeding was not Robert Beach, but Robert Beach, administrator with the will annexed of the estate of Samuel H. Beach, the deceased executor of the estate of Carrie A. Beach, accounting for the acts of the deceased executor. Plaintiff was not entitled to notice of the appointment of the administrator with the will annexed because she was not interested in the estate of her brother, Samuel H. Beach. Plaintiff was not cited by constructive service; she was served personally with a citation, and the record on appeal, prepared by plaintiff's attorney, Robert L. Collins, for use in connection with an appeal in the Appellate Division, Fourth Department of the Supreme Court of the State of New York, so shows.

Page 12. The statement that discovery proceedings "were then held in October, 1959 to January, 1960," is

inaccurate. Plaintiff's attorney was still serving interrogatories, supplementary interrogatories and demands for admission in February, March and April, 1960.

Page 12. The statement that "at a pre-trial hearing in May 1960 defendants requested a stay order from Judge Foley unless plaintiff agreed to drop" opposition to State Court proceedings is inaccurate for two reasons. There was no pre-trial hearing in May, 1960; it was at calendar call at the opening of that term that defendants requested that the trial be held until plaintiff's four appeals in the Surrogate's Court proceeding, then pending in the Appellate Division of the Supreme Court of the State of New York, were decided. The reason for the request was that, in the original complaint, there were allegations of misappropriation of assets by defendants. The Circuit Court of Appeals had held that Surrogate's Court had jurisdiction of the accounting phase of the litigation, and defendants claimed that the decision in the Appellate Division in the accounting proceeding would establish of what assets the estate of Carrie A. Beach consisted. In his opinion of June 1, 1960, Judge Foley said in part: "The state appeals have been taken by the attorneys for the plaintiff, and the choice to expedite these appeals is in their hands, and they should inform the Appellate Division, Fourth Department, of the need for speedy decision in order to try the issues we have in this District Court." On September 13, 1960, plaintiff's attorney stipulated in writing that the trial in Federal Court be held until plaintiff's appeals in the Appellate Division were decided, and, instead of expediting the appeals, plaintiff's attorney delayed so that the appeals were not argued until October 19, 1960. The decision, adverse to plaintiff, was rendered on December 9, 1960.

Plaintiff did not notice the case for the January, 1961 term.

Plaintiff noticed the case for the March, 1961 term, and at a conference following calendar call on March 7, 1961, plaintiff's trial counsel told Judge Foley that plaintiff felt that both Judge Foley and Judge Brennan were prejudiced against her and that she wanted an outside Judge.

Page 13. The statement, in substance, that plaintiff's counsel was ordered to appear for trial on April 10, 1961, that defendants refused to proceed, and that Judge Brennan ordered plaintiff to amend the complaint is absolutely false. The facts are that a jury was drawn on April 4, 1961, after which a lengthy conference was held by Judge Brennan with counsel to try to clarify the issues. At one point, near the end of the conference, it was agreed that the trial would proceed on the basis of the conspiracy portion of the complaint alone, subject to plaintiff's approval. One of plaintiff's attorneys left the conference to talk with plaintiff and returned to say that she would not go to trial on that basis. Thus it was plaintiff, and not defendants, who refused to go to trial.

The following is from the record taken by the court reporter, Mr. Manheim being plaintiff's trial counsel:

> "The Court: Let the record show that we have been in conference, the parties and the Court, most of the time since early morning or since the jury was drawn. It is now four o'clock.
>
> "I think that the parties have agreed that the pleadings should be amended and I am going to let them make their own statement. I think also that this jury be discharged from any further consideration of the case.
>
> "All right, gentlemen, put on the record what you wish to do.
>
> "Mr. Manheim: The plaintiff is to submit an amended pleading properly identifying the parties to the l. gation and properly conferring jurisdiction upon the Court, and also setting forth its

cause of action necessary to accomplish the construction of the will. And also to continue an action against the Rome Trust Company and the defendant McMahon for mismanagement of trust funds, fraud in the management of trust funds and conspiracy between the defendants in the management of trust funds, all of which was intended to and did deprive the plaintiff of a fair and adequate return of the proceeds of the trust established for her benefit.

"The Court: Gentlemen I don't believe you are bound by what Mr. Manheim said. You are to receive an amended complaint setting up a cause of action and I urge you when you serve it to separately state the number of causes of action, to make them as concise as you can, as to the theory or basis of your right to recover. All right. That is to be done within ten days.

"Mr. Manheim: Yes.

"The Court: All right. Then I assume the defendants will answer, and if I understand it right, it is agreed that the Court may order the case on the May Term of this Court, to be held commencing the first part of May.

"Mr. Austin: That is agreeable.

"The Court: Even though the time to file a note of issue has expired by the time you answer.

"Mr. Manheim: May the plaintiff express, and I believe that the defendants will join in with the plaintiff as expressing a desire, for the record, that within the realm of availability Judge Brennan will hear the case.

"The Court: All right. And I want each of you to send to me, when you serve your amended complaint and when you gentlemen serve your answers, mail copies to me at my office in Utica, and I may call a pre-trial hearing because I am not going to let this next case get into the condition this is in."

Page 14. The statement that "Plaintiff's counsel reluctantly complied with this ruling on a promise the Judge

might hear the case in June 1961" is false; there was no ruling, there was no promise to hear the case in June, and the amended complaint wasn't served until April 27.

On May 1, 1961, after receiving a copy of the amended complaint, Judge Brennan wrote counsel, in part:

> "I would like to try this case at the Term which opens at Albany tomorrow, May 2, but I can see that there must be some preliminary work done before the case is reached. * * * I dislike to officially order a pre-trial conference because counsel for the plaintiff resides at a considerable distance from either Utica or Syracuse but, on the other hand, time and expense might be saved by such action. I would be glad to have your reaction to this letter immediately."

On May 6, 1961, plaintiff's attorney replied to Judge Brennan, in part:

> "In reply to your letter of May 1, 1961 with reference to the above cause the plaintiff is unable to make any commitment as to policy until the defendants have served and filed their verified answers."

On May 10, 1961, Judge Brennan wrote counsel, in part:

> "I would like to try this case at Albany as soon as possible and unless some of the problems are disposed of prior to the trial date, I am fearful that we will encounter the same situation that we met at Syracuse. For the above reason, I have prepared an order for a pre-trial conference which is enclosed."

The order set May 22, 1961, as the date for the pre-trial conference.

On the morning of May 22, a telegram was received from plaintiff's attorney requesting that the conference be postponed until May 29. Judge Brennan advised that

the date of May 29 was not available and he adjourned the matter until June 1. In so adjourning it, he wrote counsel on May 23, in part:

> "This matter should not be further delayed: in fact, it cannot be further delayed if there is any hope of trying the case in June. Please make arrangements to be present on the adjourned date mentioned above."

On May 30, 1961, defendants' attorneys received a telegram from plaintiff to the effect that the pre-trial hearing "must be postponed because as of this date I have been unable to secure local trial counsel. In addition I have a motion pending in U. S. Court of Appeal which must be decided before I can make any commitments."

On May 31, 1961, defendants' attorneys received notice of motion from plaintiff's attorney, returnable in the Circuit Court of Appeals for the Second Circuit on June 5, 1961, for the assignment of an outside Judge. The motion was denied on June 7, 1961, and the Court suggested "that the district court set the case for early trial at the next term of court in September 1961."

On June 1, 1961, Judge Brennan wrote counsel in part:

> "By reason of telegrams from Mrs. Beach and motion papers submitted by Mr. Collins, which I received this morning, I have adjourned the pre-trial hearing in the above matter, the adjourned date to be fixed by me with three days notice to counsel after the Circuit Court has decided the pending motion. * * * I do not want any misunderstanding as to the trial of the case at the present term of Court. The case can be reached and tried at any time within the next couple of weeks. * * * If I am to preside at the trial, I think I can arrange for the disposition thereof very promptly after Mr. Collins notifies me that he is ready to proceed."

On June 8, 1961, after receiving the decision of the Circuit Court denying plaintiff's motion for assignment of an outside Judge, Judge Brennan wrote counsel in part:

> "I request Mr. Collins to advise me as soon as possible when it will be agreeable to him to hold the pretrial conference as per the order already issued. I also request Mr. Collins to advise as soon as possible as to whether or not the opening day of the September Term is an agreeable date for the trial of this action."

On June 21, 1961, Mr. Collins wrote Judge Brennan in part:

> "* * * Plaintiff consents to trial of the above cause before court and jury at the September 1961 Term upon the following conditions. 'First: There be no further pre-trial hearings and defendants be compelled on a day certain to appear ready for trial * * *."

On June 27, 1961, Judge Brennan wrote counsel to the effect that he would like very much to have the pre-trial hearing at least by the middle of July, that if no date be agreed upon by Mr. Collins and other counsel by July 10, the Court would fix the date himself, and that he expected to hear from Mr. Collins by July 10.

On July 8, Mr. Collins wrote Judge Brennan that the earliest available date for the pre-trial conference would be August 10, 1961.

On July 11, 1961, Judge Brennan wrote counsel setting August 11 as the new date.

On August 2, 1961, Mr. Collins wrote Judge Brennan in part:

> "Hence, the tentative pre-trial hearing of August 11, 1961, will have to be postponed indefinitely."

On August 7, 1961, Judge Brennan wrote counsel that the order for a pre-trial hearing on August 11, 1961, would stand.

On August 10, 1961, Mr. Collins wired Judge Brennan requesting an adjournment to September 6.

On August 11, 1961, Judge Brennan wrote Mr. Collins that over the objection of counsel for the defendants, he had adjourned the pre-trial hearing until September 6.

On August 23, 1961, counsel for the defendant trustee notified plaintiff's attorney that at the opening of the term on September 12, 1961, the Court would be requested to direct that the trial of the action commence on September 18, 1961.

On September 2, 1961, plaintiff's attorney served a notice of motion returnable in District Court on September 11 for an order compelling the defendant trustee to advance plaintiff the sum of $2,000 for trial expenses.

On September 4, 1961, plaintiff's attorney wired Judge Brennan requesting another adjournment of the pre-trial hearing, and on the following day Judge Brennan adjourned it until September 11.

On September 9, 1961, plaintiff's attorney wired Judge Brennan that he wanted to submit the counsel fee motion for decision and that he would not be ready for trial until resources of trial counsel were available.

Plaintiff's attorney did not appear for the pre-trial hearing on September 11, and defendants' attorneys moved for the dismissal of the action because of his failure to so appear. The motion was denied and the pre-trial hearing date was adjourned to September 22.

Plaintiff's attorney did not appear on September 22. Defendants' attorneys again moved for the dismissal of the action because of such non-appearance, and on that date Judge Brennan issued an order reading in part:

> "ORDERED that this action be and the same is hereby dismissed unless plaintiff's counsel appears at a pretrial hearing in this action to be held at the Federal Court House in the City of Syracuse on Monday, October 2, 1961 at 10 A. M. and that plaintiff and her counsel appear ready for the trial of this action on October 9, 1961 at 10 A. M. at the Term now in session at Syracuse."

On October 2, 1961, no appearance was made by plaintiff's attorney as directed in the order of September 22, and an order of dismissal was granted orally with directions to present a formal order of dismissal. About half an hour later an attorney appeared in court and advised Judge Brennan that he did not represent the plaintiff, had no power to make commitments and was in the process of examining the records to ascertain whether or not he would appear as plaintiff's counsel in the litigation. The Court's signature to the proposed dismissal order was then withheld pending the attorney's decision. On October 6, the attorney decided not to appear in the action.

On October 8, Judge Brennan received a telegram from plaintiff and her attorney, Mr. Robert L. Collins, requesting him to give them "a date for the pre-trial hearing you have requested," and stating that their preference was November 6 but that they would agree to any reasonable date.

On October 11, Judge Brennan set November 6, 1961, as the pre-trial hearing date.

Despite the long and patient efforts of Judge Brennan to get plaintiff to try her law suit, as indicated in the brief summary above, there is the statement at page 17 of the petition, in substance, that the Judges in the Northern District refused for two and a half years to allow the plaintiff a trial on any basis.

Finally, on November 6, 1961, almost six months after the date first set for the pre-trial hearing, Mr. Robert L. Collins did appear for such hearing. He was accompanied by plaintiff and her trial counsel, each of whom was present during the entire hearing, and at that hearing Mr. Collins, in his own language, at long last told the Court what he claimed the issue to be in the first alleged cause of action of the amended complaint. That very language is embodied in Pre-trial Order No. 1, dated November 9, 1961, which isn't mentioned in the petition, of course, and which reads as follows:

> "The issue of the first cause of action is defined as a conspiracy to defraud plaintiff of her life estate as created by the last Will of Carrie A. Beach, deceased."

The statement at page 14 that Judge Brennan "compelled plaintiff to try the second cause of action pertaining to her rights under the stock in November, 1961, and would not allow a trial of the Second Cause until January 10, 1962," is both inaccurate and amusing, inaccurate in that the order of trial of the issues and the dates of beginning of the trials were agreed to by counsel, including Mr. Robert L. Collins, in the presence of plaintiff herself at the pre-trial conference on November 6, 1962, and amusing in that such statement is an admission that once Mr. Collins did attend the pre-trial hearing, adjourned so many times at his request, but never at the request of the defendants, he had a trial of the non-jury phase of the litigation three days after the date of the conference and a trial of the jury phase starting on the opening day of the very next term of court.

Argument.

There can be no quarrel with the quotation from the decision in the Standard Machinery Company case cited at page two of the petition; of course damages may be assessed in favor of a beneficiary against a defaulting trustee. However, the quotation in the petition doesn't go far enough, for the decision from which the quotation is taken also reads that "In this state of the proof the judgment against Moyer (the trustee) cannot stand." The decision in the case at bar does not conflict with the holding in the Standard Machinery Company case. In the instant case, Judge Brennan dismissed for lack of proof. In affirming, the Circuit Court said that "plaintiff failed to adduce evidence sufficient to warrant submission to the jury of her claim for breach of trust, fraud, and conspiracy in the administration of the trust." There was no holding that, in an instance in which a cause of action is proven, damages may not be assessed; there was a holding of lack of proof, and there was just such a holding in the Standard Machinery Company case.

The propriety of such a decision by Judge Brennan, and by the Circuit Court, in affirmance, is illustrated by the fact, for example, that while it is alleged in the amended complaint that "from August, 1952, and subsequent thereto, defendant, Johnson D. McMahon, a director of Rome Trust Company, conspired, combined and confederated with the officers and directors of Rome Trust Company to defraud plaintiff of her interest in the assets of the family fortune and of her one-half in for mother's estate. That in furtherance of the conspiracy defendant, Johnson D. McMahon prevailed upon Carrie A. Beach to deviate from terms of will of Samuel H. Beach, Sr., and to name Rome Trust Company as trustee under her will. That pursuant to the said conspiracy, loans and

lines of credit were given by Rome Trust Company to Beach Lumber Company and to Johnson D. McMahon," yet,

1. the will of Carrie A. Beach was executed on February 3, 1950, some thirty months before the alleged conspiracy to prevail upon her to deviate from the terms of her husband's will is alleged to have begun, and

2. proof at the trial established that Mr. McMahon had a line of credit with Rome Trust Company starting on March 10, 1936, some sixteen years before the alleged conspiracy is supposed to have begun.

Taking apart the question at page seven of the petition, plaintiff's reasoning appears to be:

1. In 1959, the Circuit Court of Appeals for the Second Circuit held that the complaint, then before it, sufficiently stated a cause of action for fraud, so, therefore

2. that same Court does not have the power to affirm the action of a Trial Judge in dismissing the cause of action, for lack of proof, at the conclusion of the presentation of plaintiff's case during trial

3. because plaintiff's complaint never alleged any facts except those showing breach of trust and constructive fraud.

In the first place, as a reading of Judge Lumbard's opinion in the appendix to the petition (p. 2a) shows very clearly, the only question decided by the Circuit Court in 1959, was one of jurisdiction of subject matter, i. e., whether or not Judge Foley should have declined jurisdiction as to each of the five alleged causes of action in that particular complaint.

In the second place, the complaint which was before the Circuit Court in 1959 was not the pleading on which plaintiff went to trial; the litigation was tried on the amended complaint served in April, 1961.

In the third place, the statement at page eight of the petition that "plaintiff's complaint never alleged any facts except those showing breach of trust and constructive fraud," and the statement at page 15 that "plaintiff's complaint had always been based on constructive fraud theory and had been made law of case" are inaccurate. Again, the only pleading to be considered is the amended complaint. As stated above, plaintiff's attorney, Mr. Robert L. Collins, at the pre-trial conference on November 6, 1961, told the Court, when asked to define the issue of the first cause of action in the amended complaint, that such issue is "a conspiracy to defraud plaintiff of her life estate as created by the last Will of Carrie A. Beach, deceased." That is the very language Judge Brennan embodied in the Pre-trial Order, and that did become the law of the case. In addition, the first alleged cause of action in the amended complaint contains such language as "conspired, combined and confederated * * * to defraud * * * in furtherance of the conspiracy * * * pursuant to the said conspiracy * * * to facilitate the execution of the conspiracy to defraud * * * in furtherance of the conspiracy to defraud."

CONCLUSION.

The petition discloses no reason whatsoever why the writ should be granted. The application should be denied.

Respectfully submitted,

G. EDWARD LaGATTA,
(Member of Bar of Supreme Court of the United States.)

JAMES T. GRIFFIN,
Counsel for Respondent, Oneida National Bank and Trust Company of Central New York.

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 465

PRISCILLA ALDEN BEACH, a/k/a PRISCILLA A. HICKEY, Widow,

Plaintiff,

vs.

ONEIDA NATIONAL BANK AND TRUST COMPANY OF CENTRAL NEW YORK (Successor to ROME TRUST COMPANY) and JOHNSON D. McMAHON,

Defendants.

BRIEF FOR RESPONDENT, JOHNSON D. McMAHON.

DONALD SPADONE,
JOHNSON D. McMAHON,
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American Block,
Rome, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4131—1962

In the

Supreme Court of the United States

October Term, 1964

Priscilla Alden Beach, a/k/a Priscilla A. Hickey, Widow,

Plaintiff,

vs.

Oneida National Bank and Trust Company of Central New York (Successor to Rome Trust Company) and Johnson D. McMahon,

Defendants.

BRIEF FOR RESPONDENT.

Introduction.

The case is here on a petition by plaintiff for a Writ of Certiorari to the United States Court of Appeals, Second Circuit, to review a judgment of affirmance of two judgments entered against her on two separate claims, one after trial with a jury but terminated in a dismissal at the conclusion of the plaintiff's case and the other after trial without a jury.

The first cause was in the nature of a common-law claim for money damages resulting from an alleged conspiracy to defraud plaintiff of a life estate with the right of trial by jury. (It was not a claim of negligence and was not in the nature of an equitable claim such as upon an accounting.) See Pre-trial Order No. 1, paragraph 3, in the appendix attached to this brief.

The second cause was in the nature of an equitable claim to determine title to certain shares of stock held in a testamentary trust.

Plaintiff claims lack of due process, denial of right to jury trial and error by the Federal Court in applying the New York substantive law concerning fraud

Statement of Procedural Facts.

The action was commenced in June of 1958. Thereafter, motions to the jurisdiction of the Federal Court were made by the defendants. The motions were granted and the complaint was dismissed. This decision was appealed to the Court of Appeals, and reversed in part and sustained in part and the case was remanded for further proceedings (269 Fed. 2d 367). Answers were interposed in August, 1959, and further motions to the pleadings were made and denied pending pre-trial conferences. Examinations of the defendants and the plaintiff were held over a period of months during late 1959 and early 1960, principally at the convenience of the plaintiff and her attorney.

The case was first noticed on the Calendar, March, 1960. The notice was withdrawn by plaintiff since examinations were not complete. The case was again noticed for May, 1960. At this time last minute appeals by plaintiff were filed in the Appellate Division of the New York Supreme Court covering some of the issues determinative in this case. Over the objections of plaintiff, the case was put over until November, 1960, so that the State Court's decision could be known. (During the times hereinbefore mentioned an accounting proceeding in the estate of plaintiff's mother was being taken through the Oneida County Surrogate's Court [N. Y.]. The District Court's dis-

missal of plaintiff's cause of action for an accounting in the Federal Court was affirmed by the Court of Appeals decision, 269 Fed. 2d 367.)

Plaintiff unsuccessfully petitioned the Court of Appeals for mandamus against the decision to put the case over to November, 1960.

Plaintiff did not proceed expeditiously to argue the appeal in the State Appellate Division. Since the decision therein was not entered until December, 1960, this case went over the November 1960 term for the same reason that it went over the May 1960 term.

The case was next noticed for trial at the April 1960 term of District Court. At this term a jury was drawn. After an all day conference in the Judge's chambers wherein plaintiff had local counsel as well as counsel of record, the jury was dismissed. The issues and theories of liability were determined to be in such a clouded state as to require an amended complaint which counsel for plaintiff agreed to furnish.

An amended complaint was served, answered and a pre-trial conference thereon was ordered by the District Judge for September, 1961. Plaintiff's counsel refused to attend such a conference until coerced to do so when the Judge made a conditional order of dismissal. Thereafter a conference was held and a pre-trial order was made defining the causes of action, dividing them as between jury and non-jury, ordering the non-jury trial for November, 1961, and the jury trial for January 9, 1962. Each trial resulted in judgment for the defendants. The cause tried before the jury was dismissed at the close of plaintiff's case for failure to present an issue of fact or *prima facie* proof of a cause of action.

An appeal was taken to the Court of Appeals on the whole case by the plaintiff. The judgments below were affirmed from the bench and judgments with costs were entered June 29, 1962.

Statement of Facts on the Merits.

Carrie A. Beach, mother of plaintiff, died November 15, 1951, testate. Her will, probated February 26, 1952, established a trust for plaintiff consisting of 495 shares of common stock of the Beach Lumber Company, Rome, New York, and one-half the residue of her estate. The Oneida National Bank and Trust Company of Central New York (then Rome Trust Company), one of the defendants, was named trustee, and was directed to pay the income to plaintiff for life with remainder over (Exhibit 1, p. 156 of Appendix in Court of Appeals).

Letters of trusteeship were issued June 11, 1953, and the first regular income remittance was made to plaintiff on September 16, 1953 (Exhibit 14, p. 174). The income between testatrix's death and establishment of the trust was adjusted and paid following the final accounting in the estate and decree of judicial settlement entered February 27, 1959 (testimony, pp. 108, 109).

The Beach Lumber Company did not pay a dividend between 1949 and 1958 on its common stock. The trustee held less than 25 per cent of the outstanding shares of the company (p. 96), which is a closely held family corporation. Plaintiff's nephew is president and he and his sister hold a controlling interest. The trustee defendant brought no action to compel a dividend or to dissolve the corporation. The trustee's efforts to sell the stock failed.

This defendant, Johnson D. McMahon, was the attorney for the estate of Carrie A. Beach, as well as attorney for the trustee in the matter of this trust prior to 1958.

He has represented the Beach Lumber Company, the Rome Trust Company and various members of the Beach family for many years. He has been a director of the Rome Trust Company and its successor since 1923 and a director of the Beach Lumber Company since 1953. He has never been the attorney for the plaintiff, she having been represented during the period in question here by various other attorneys (pp. 128, 129). This defendant has never actively managed the Beach Lumber Company. (Cross examination omitted in Plaintiff's Appendix to the Court of Appeals at foot of p. 85.)

Contentions.

1. Plaintiff had her day in court with due process and her right to trial by jury was not abrogated other "than according to the rules of the common law."

2. Plaintiff failed to establish a prima facie case in fraud against this defendant and presented no question of fact for the jury. The District Court properly dismissed the first cause of action at the conclusion of plaintiff's case.

3. The District Court properly ruled that the title to the 495 shares of common stock of Beach Lumber Company remained in the trustee subject to the testamentary trust established by plaintiff's mother.

ARGUMENT.

I.

Plaintiff had her day in court with due process and her right to trial by jury was not abrogated other "than according to the rules of the common law."

A. Due Process.

The course of a case in the courts is generally determined by the plaintiff within the rules of procedure and subject to the rules of procedure.

Defendants have the right and their attorneys have the duty to defend a case within the rules of procedure.

It is submitted that nothing more nor less occurred in this case. Plaintiff set the general course and the defendants defended all within the rules of procedure. The plaintiff failed in her case and the defendants succeeded not as a result of procedural developments. Plaintiff failed on the merits of her claims. If there was a deviation from normal procedure in this case it was not caused by the defendants and did not prejudice plaintiff.

The statement of procedural facts recited in plaintiff's petition, once shorn of counsel's opinions, conjectures, suspicions and conclusions begging the question, show no lack of process and it is submitted show no lack of *due* process.

Plaintiff appears to claim lack of due process as follows:

1. Separate trials of jury and non-jury claims.
2. Refusal of trial judge to permit immaterial argument between counsel on question of who caused delay.

3. Denial by various judges including Court of Appeals to assign outside judge.

4. Bias and prejudice of both Federal District judges of the Northern District of New York.

The first two should need no comment. The latter two seem to be based only on the fact that in some of their intermediate decisions and orders, the Judges disagreed with plaintiff's position. This should need no comment.

If the Trial Judge erred in the application of substantive law in this case it would not be a lack of due process within the meaning of the Constitution. It would be an error in law correctible on appeal. Here the Court of Appeals affirmed.

B. Right to Jury Trial.

The management of estates and trusts has always been under the supervision and jurisdiction of courts of equity, probate or ecclesiastical courts. In probate and accounting procedures no right to a jury trial existed at the time of the adoption of the United States Constitution and no such right exists under New York law. New York Civil Practice Act, §425.

Plaintiff included in her case a claim of fraud or conspiracy to defraud and her counsel demanded a jury trial of this cause of action. A common-law claim of fraud is subject to the right of trial by a jury.

At the last pre-trial conference, plaintiff's counsel dictated and consented to paragraph three of the pre-trial order which defined the first cause of action as a "conspiracy to defraud plaintiff of her life estate * * *" (see paragraph 3, p. 2a).

On the trial plaintiff failed to produce proof of fraud or conspiracy. Her case tried to the jury was dismissed (see Point II below). There is nothing unusual in this. Verdicts are directed and cases are dismissed at the conclusion of the affirmative case regularly in our courts (e. g., *Dulion v. S. A. Lynch Enterprise* [C. A. 5], 53 F. 2d 568, cert. den. 285 U. S. 540). This does not give rise to a claim that the right to a jury trial has been denied. It may raise a question of substantive law and constitute error correctible on appeal. Here, the Court of Appeals affirmed.

Plaintiff's counsel argued and continues to argue that the burden of proof fell on the defendants as it would if they were accounting fiduciaries in an equity court justifying their accounts and actions. To obtain a jury plaintiff pled common-law fraud but on trial wanted to try her case as though she were a respondent filing objections in an accounting proceeding.

Plaintiff's complaint made serious allegations of wrong doing against this defendant. The trial showed that the allegations were ficticious.

Incidentally, plaintiff has never sought an accounting of the trust in the New York Surrogate's Court.

II.

Plaintiff failed to establish a prima facie case in fraud against this defendant and presented no question of fact for the jury. The District Court properly dismissed the first cause of action at the conclusion of plaintiff's case.

The first cause in this case which was tried with a jury is an action or claim in fraud. (Paragraph 3 of Pretrial Order No. 1, page 2a, this brief.)

The elements of fraud are representation, falsity, deception, *scienter* and injury. *Hackner v. Morgan*, 130 Fed. 2d 300; *Channel Master Corp. v. Aluminum Limited Sales, Inc.*, 4 N. Y. 2d 403.

There is no evidence in the record of a representation made by the defendant to the plaintiff and no rulings of the Trial Judge excluding any offered evidence of a representation. Counsel for plaintiff has argued that there is a presumed or implied or inferred representation as a result of some relationship between Johnson D. McMahon and the plaintiff. The cases cited by counsel for plaintiff and listed below are distinguished on the facts.

Butler v. Prentiss, 158 N. Y. 49, and cases cited therein;

In re Hubbell's Will, 302 N. Y. 246, and cases cited therein;

Standard Machinery Co. v. Duncan Shaw Corp., 208 F. 2d 61;

Globe Woolen Co. v. Utica Gas & Electric, 224 N. Y. 483.

In each case cited there was a very close relationship between the actual parties themselves and there were various actual representations made either openly or by silence coupled with a duty to speak. Hence, the cited cases do not support a presumption or inference as here contended

by the counsel for plaintiff. In each case cited there was a representation of a fact or the failure to disclose a fact.

There is no evidence in the record of anything said to or done toward the plaintiff falsely by either defendant and no rulings of the Trial Judge excluding any offered evidence of such act. Again, counsel for plaintiff argues that this can and should be presumed or inferred because of some relationship between the parties. In each of the cases cited by plaintiff, there was a misrepresentation either overtly or by silence. In each case the plaintiff acted under some mistake of fact known by the fiduciary defendant.

There is no evidence in the record that the plaintiff was deceived in any way by action or word of either defendant and no ruling of the Trial Judge excluding any offered evidence of any such deception. It seems obvious from the whole case that plaintiff was somehow deceived concerning the wealth of her mother and father, but neither defendant gave her reason to entertain any "Great Expectation."

There is no evidence in the record of *scienter* or evil intent by either defendant against the plaintiff and no ruling of the Trial Judge excluding any offered evidence of such a state of mind. Plaintiff did testify that certain inquiries of hers went unanswered, but such is at most a scintilla of evidence of *scienter* and hardly proof thereof in a fraud action.

Perhaps most striking here is the complete absence of any evidence from which a jury or a Judge could ascertain that the plaintiff suffered injury and, if any, to what extent. Counsel for plaintiff questioned an officer of the corporate defendant concerning the 495 shares of common stock of Beach Lumber Company held by the corporate trustee. The stock paid no dividends except $1 in 1959 and $1.25 in 1960. The officer testified to his unsuccessful efforts to sell this asset of the trust. (Omitted in Plaintiff's Appen-

dix.) He testified as to conversations he had had with the officers of Beach Lumber Company concerning the possible payment of dividends. (Omitted in Plaintiff's Appendix.) The exhibits in evidence (year end financial statements of Beach Lumber Company, p. 160 *et seq.*, referred to p. 101 *et seq.*) do not show any corporate wrongdoing in failing to declare and pay dividends. The exhibits show that most of the gain in net worth during the years in question came, not from operations, but from the sale of real estate because of a relocation of the lumberyard.

There is no evidence that either defendant influenced the dividend policy of Beach Lumber Company. (That company is not a party to this suit.) The Trial Judge repeatedly questioned the relevancy of the offered line of proof concerning the ability or requirement that Beach Lumber Company declare dividends. However, he allowed the evidence to be presented. The Trial Judge did exclude an independent accountant's opinion concerning whether or not the Beach Lumber Company could or should have paid dividends over the years in question. The ruling appeared to be based on lack of relevancy and on failure of counsel to make his question specific enough for understanding (p. 144).

Plaintiff submitted no evidence or proof concerning damages or injury. Counsel argued (p. 145 *et seq.*) as he had in the complaint and in other papers in this case that the fact that the trust did not provide a sum sufficient for plaintiff's needs or desires was proof of damage. This would make strange law.

There is no evidence in this record that anyone was unjustly enriched and no evidence that this defendant, Johnson D. McMahon, received anything of value or any advantage.

The burden of proof of establishing fraud is on the plaintiff. *Lynch v. Gibson*, 254 App. Div. 47, aff. 279 N. Y.

636: "Fraudulent acts will not be presumed nor can they be based merely on suspicion, conjecture or doubtful inference." *Lowendahl v. B. Y. O. R. R. Co.*, 247 App. Div. 144, 158. "Fraud will not be presumed in the absence of proof of facts from which concealment or imposition may be inferred." *Matter of Peltz*, 14 Misc. 2d 18; *Matter of Phillips*, 293 N. Y. 483, 491.

Plaintiff failed to prove a prima facie case on the trial of this action.

III.

The District Court properly ruled that the title to the 495 shares of common stock of Beach Lumber Company remained in the trustee subject to the testamentary trust established by plaintiff's mother.

Concerning the second cause of action, this defendant is not a party in interest. Reference is made to the memorandum decision of the Trial Judge set forth as an appendix to the petition of the plaintiff, page 15a, which, it is submitted, correctly determines the question.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DONALD SPADONE,
JOHNSON D. McMAHON,
Counsel for Defendant-Respondent, Johnson D. McMahon,
American Block,
Rome, New York.

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Appendix 1a

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APPENDIX A.

UNITED DISTRICT COURT.

NORTHERN DISTRICT OF NEW YORK

PRISCILLA ALDEN BEACH, a/k/a Priscilla A. Hickey, Widow,

Plaintiff,

against

ONEIDA NATIONAL BANK AND TRUST COMPANY OF CENTRAL NEW YORK (Successor to Rome Trust Company) and JOHNSON D. MCMAHON,

Defendants.

Civil No. 7116.

Pretrial Order No. 1.

A pretrial conference was held on November 6, 1961, pursuant to the order of this court of May 10, 1961 for the purpose of considering ways and means of expediting the trial and facilitating the orderly presentation of proof. The plaintiff appeared in person and by Harold Blodgett and Robert L. Collins, her attorneys. Defendant Rome Trust Company appeared by Attorney James Griffin. Defendant McMahon appeared in person. After a conference, discussion, agreement and consideration, it is ORDERED—

1. That the trial of the second cause of action, set forth in plaintiff's amended complaint, shall be held on November 9, 1961 at the Federal Court House in the City of Utica, New York.

2. That the trial of the first cause of action in plaintiff's complaint shall commence on January 9, 1962 at 11 A. M. at the Federal Court House in the City of Utica, New York.

3. The issue of the first cause of action is defined as a conspiracy to defraud plaintiff of her life estate as created by the last Will of Carrie A. Beach, deceased. Money damages is the relief requested.

4. Within ten days from the date of this order, the plaintiff shall list in writing the names of the officers and directors of the Rome Trust Company with whom the defendant McMahon is charged in paragraph 9 of the complaint with having "conspired, combined and confederated with * * * to defraud plaintiff of her interest in the assets of the family fortune and of her one-half interest in her mother's estate."

5. Within ten days from the date of this order, the plaintiff shall set forth in writing "* * * the circumstances constituting fraud * * * with particularity."

6. If the plaintiff intends to offer proof of loans to defendant McMahon in accordance with paragraph 13 of the complaint, plaintiff within ten days shall state in writing the dates of and the amounts of said loans. If no such proof will be offered, plaintiff shall state such fact in writing within the above time period.

7. Defendant McMahon shall make available to the plaintiff upon the trial of this action the minute books of the Beach Lumber Company containing the minutes of the meetings of the stockholders and directors of said company from 1949 to 1960. Said defendant shall also produce as above profit and loss statements and yearend statements of the Beach Lumber Company from 1949 to 1960.

8. Defendant Rome Trust Company shall make available to the plaintiff upon the trial of this action books containing the minutes of meetings of the stockholders, board of directors and trust committee of said trust company covering the period from 1949 to October 8, 1958. Said defendant shall also make available as above its ledger sheets showing the details of any and all loans made by said company to the Beach Lumber Company and to defendant McMahon during the above time period.

9. Defendant McMahon will make available to the plaintiff upon the trial of this action his office copy of a Will of Carrie A. Beach dated prior to February 3, 1950.

10. Within twenty days from the date of this order, the plaintiff shall list in writing the documents or writings which will be offered as a part of plaintiff's affirmative case. Such list shall describe the writings, sufficiently for their identification.

11. All documents or writings, listed as required in the last preceding paragraph, shall be deemed authentic, genuine and no objection to their admission because of lack of foundation therefor shall be made unless within ten days after the receipt of said list the defendants shall enumerate in writing the specific documents to which objection as to authenticity, genuineness or foundation shall be made.

12. The only assets of the Estate of Carrie A. Beach involved in this litigation are 495 shares of common stock of the Beach Lumber Company.

13. The writings, referred to and required herein, shall be signed by the attorneys for the respective parties required to furnish same. The original of such writings shall be filed in the Clerk's office within the time period prescribed and copies thereof shall be mailed to the Court and served upon the attorneys for the opposing party or parties.

14. Plaintiff and her counsel have agreed that any notices and communications required to be served by the Clerk upon plaintiff or her counsel may be mailed to Harold Blodgett, Esq., 408 State Street, Schenectady, New York, and all communications and legal papers by Court or counsel for defendants may be likewise so served.

STEPHEN W. BRENNAN
United States District Judge.

Dated: November 9, 1961.